

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Proposed Tower KY-03061 Lloyd Rd Near 1621)
Stamping Ground Road, Georgetown, Scott)
County, Kentucky/Choctaw Academy)
)
)

ORDER

Adopted: October 10, 2017

Released: October 10, 2017

By the Associate Chief, Competition and Infrastructure Policy Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On March 8, 2017, the Competition and Infrastructure Policy Division of the Wireless Telecommunications Bureau (WTB) issued a Letter Decision (Decision) finding that Skyway Towers LLC's (Skyway) proposed tower in Scott County, Kentucky will have no effect on any historic property.¹ On April 7, 2017, William Richardson (Richardson) filed a timely Petition for Reconsideration (Petition) requesting WTB reconsider its Decision.² On April 11, 2017, Richardson filed a Motion for Leave to File a Supplement to the Petition (Motion) and a Supplement to Petition for Reconsideration (Supplement),³ maintaining he was not afforded a "meaningful opportunity to be heard."⁴ For the reasons discussed below, WTB denies the Motion, dismisses the Supplement, and resets the pleading cycle on the Petition.

II. BACKGROUND

2. On April 27, 2016, Skyway submitted an FCC Form 620 to the Kentucky Heritage Council (KY SHPO)⁵ regarding a proposed 199-foot tower near 1621 Stamping Ground Road, Georgetown, Scott County, Kentucky.⁶ On June 3, 2016, the KY SHPO issued a letter recommending that the proposed tower would have an adverse effect on the nearby Choctaw Academy.⁷ On October 31,

¹ *Proposed 199-Foot Tower Near Stamping Ground Road, Georgetown, Scott County, Kentucky*, Letter Decision (WTB/CIPD Mar. 8, 2017) (Decision).

² William Richardson Petition for Reconsideration, at 2 (filed Apr. 7, 2017) (Petition).

³ Motion of William Richardson for Leave to file a Supplement to his Petition for Reconsideration (filed Apr. 12, 2017) (Motion); Supplement to Petition for Reconsideration of William Richardson (filed Apr. 12, 2017) (Supplement).

⁴ Motion at 3.

⁵ The Kentucky Heritage Council is the State Historic Preservation Officer for Kentucky pursuant to 54 U.S.C. § ____.

⁶ See Decision at 2, para.4. Skyway had previously submitted a Form 620 for a 300-foot tower on the same property. See *id.*

⁷ See *id.* at 3, para. 2.

2016, the KY SHPO requested that the Area of Potential Effects (APE) for visual effects be expanded to include the Choctaw Academy, which is located outside the presumed ½-mile APE established by the Nationwide Programmatic Agreement (NPA).⁸ On March 8, 2017, WTB issued a Decision finding the proposed tower would have no effect on the Choctaw Academy or any other historic property, and the siting of the tower did not warrant an increased APE for visual effects.⁹ The Decision also rejected the KY SHPO's recommendation of "adverse effect," and concurred with Skyway's finding of "No Historic Properties Affected."¹⁰

3. *Petition for Reconsideration.* On March 20, 2017, Richardson, the owner of the Choctaw Academy and a consulting party to the Section 106 process for the tower, emailed Stephen DelSordo, the Federal Communications Commission's Federal Preservation Officer, requesting that WTB re-evaluate its Decision denying the KY SHPO's recommendation of "adverse effect" (March 20th Email).¹¹ In support of his request, Richardson argued that the Section 106 Review process was not properly conducted, the Consulting Parties operated under false information, public engagement was non-existent, and the survey of assets was incomplete.¹²

4. WTB staff contacted Richardson on March 31, 2017, to inform him of the Commission's procedural requirements for filing a Petition and explain that the March 20th Email did not amount to a formal Petition in accordance with the Commission's rules.¹³ At the request of the parties, a teleconference was arranged for April 6, 2017 with Christopher Clendenen (Richardson's counsel), Michele Farquhar and Arpan Sura (Skyway's counsel), and WTB staff to ensure that all parties had relevant information and documents. During this conference call, the parties discussed allowing Richardson an extension beyond the statutory 30-day period to supplement his Petition,¹⁴ but the parties did not agree on an extension.

5. On April 7, 2017, Richardson timely filed the Petition, arguing that the proposed tower site is 0.69 mile from the Choctaw Academy, not 1.6 miles as stated in the Decision, and that the APE should be expanded to a three-quarter mile radius under the NPA.¹⁵

6. *Motion for Leave to file a Supplement to Petition for Reconsideration.* Richardson emailed his Motion and Supplement to Skyway and WTB staff on April 11, 2017, four days after conclusion of the statutory 30-day reconsideration period, and filed the Motion and Supplement the next day.¹⁶ Richardson argues in the Motion that because he was unaware of the inadequacy of his March 20th email as a petition for reconsideration until shortly before the 30-day period expired, he was not given a meaningful opportunity to be heard and he is therefore entitled to file a Supplement to his Petition.¹⁷

⁸ See *id.* at 3, para. 1; Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, 47 CFR Part 1, App. C, §§ VI.C.4.a (presumed half-mile APE for visual effects for towers 200 feet or less in height), VI.C.6 (Commission may establish an alternative APE upon request if applicant and SHPO/THPO cannot agree) (NPA).

⁹ See *id.* at 1, para. 1.

¹⁰ See *id.* at 1, para. 1.

¹¹ Motion at Exh. 2 (March 20th Email). Exhibit 2 contains an email chain that includes Richardson's March 20th email. For purposes of this Order, we use the shorthand "March 20th Email" when referring to the March 20th email contained in Exhibit 2.

¹² See March 20th Email.

¹³ See Motion at Exh. 2; 47 CFR § 1.106(f).

¹⁴ See 47 U.S.C. § 405(a) (30-day period to file petitions for reconsideration).

¹⁵ See Petition at 2.

¹⁶ Motion; Supplement.

¹⁷ See Motion at 2-3.

Pending a ruling on the Motion, Division staff tolled the pleading cycle for the underlying Petition, and established a pleading cycle for parties to respond to the Motion.¹⁸ On April 20, 2017, Skyway submitted an Opposition to Richardson's Motion (Opposition), arguing the Motion should be denied because no extraordinary circumstances justify the late submission of the Supplement.¹⁹ On April 28, 2017, Richardson filed a Reply to Skyway's Opposition to the Motion (Reply).²⁰

III. DISCUSSION

7. Absent extraordinary circumstances, the Commission's power to consider petitions for reconsideration is limited to those filed within 30 days of the Commission's final action.²¹ Section 1.106(f) of the Commission's rules states that a Petition, *and any supplement thereto*, shall be filed within 30 days from the date of public notice of the final Commission action, and shall be served upon parties to the proceeding.²² Although Section 1.106(f) gives the Commission discretion to consider late-filed supplements to timely filed petitions if a petitioner presents sufficient justification,²³ the Commission does not generally or readily accept late-filed supplements, and the Commission will not accept new information raised in a late-filed supplement without an explanation for the omission of the new information in the original Petition.²⁴ The Commission has stated that a strict enforcement of Section 1.106(f)'s filing period is "both necessary and desirable" to prevent Commission staff from being overwhelmed by pleadings.²⁵

8. In his Motion, Richardson argues he was not afforded a "meaningful opportunity to be heard" regarding his timely-filed Petition.²⁶ He argues that after following the suggestion of WTB staff to obtain counsel and all necessary documentation, his "meaningful opportunity to be heard" amounted to ninety minutes to draft and submit a Petition.²⁷ We reject this argument, as the Commission has long held that ignorance of its rules does not constitute good cause for failure to comply with them.²⁸ Section 1.106 of the Commission's rules sets forth the requirements for a Petition for Reconsideration. Without intervention, which WTB staff was not required to undertake, the March 20th Email would have been subject to dismissal for failure to meet multiple requirements, including the obligation to serve other parties²⁹ and the requirement to file with the Secretary wherein there is an explicit statement that email to

¹⁸ See Opposition at Exh. V.

¹⁹ See *id.* at 4-5, 47 CFR § 1.106(f).

²⁰ William Richardson's Reply to Skyway Towers, LLC's Opposition to Leave to File Supplement to Petition for Reconsideration and/or Motion to Strike. (Apr. 28, 2017) (Reply).

²¹ 47 U.S.C. § 405(a). See *Paging Sys., Inc.*, Order on Reconsideration, 25 FCC Rcd 8476, 8480 (2010).

²² See 47 CFR § 1.106(f).

²³ 47 CFR § 1.106(f); 47 U.S.C. § 405.

²⁴ See *Lauren Colby, Esq. Gregory Masters, Esq. Wiley Rein LLP*, 27 FCC Rcd 7626, 7628 (2010); see also *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 199-200 (D.C. Cir. 2003) (affirming the Commission's decision not to exercise its discretion to hear the late-filed supplement when the petitioner offered no plausible explanation for why supplemental arguments were not made in its initial petition).

²⁵ See *Pathfinder Communications Corp. (WCUZ - FM)*, Memorandum Opinion and Order, 3 FCC Rcd 4146, para. 5 (1988).

²⁶ Motion at 2.

²⁷ See *id.* at 3.

²⁸ See *Application for Review of Southern California Broadcasting Co. Licensee, Radio Station Kiev (AM) Glendale, Cal.*, Memorandum Opinion and Order, 6 FCC Rcd. 4387, para. 3 (1991).

²⁹ 47 CFR 1.106(f) ("The petition for reconsideration and any supplement thereto . . . shall be served upon parties to the proceeding").

staff is inadequate.³⁰ Thus, rather than prevent Richardson from submitting a valid Petition, as Richardson contends, WTB Staff preserved his ability to have his concerns considered at all.

9. In addition, Richardson's reliance on *Gardner v. FCC* is misplaced, as the court in that case found that the Commission had failed to provide notice of its decision to an interested party.³¹ In this case, Richardson acknowledges that he was provided notice of the Decision.³²

10. In his Reply, Richardson argues that Skyway failed to consider in its Section 106 review an additional property, known as Groverland, that he states is historic, and that this failure constituted a "material error, misinformation, or omission submitted by the applicant" which should cause the Commission to re-open the Section 106 process.³³ We note that the March 20th Email alleges that there are three properties within the proposed tower's APE that Skyway did not address, presumably including Groverland.³⁴ Indeed, Richardson acknowledges that he knew about Groverland no later than March 20, 2017.³⁵ Thus, Groverland was known to Richardson well before the April 7th filing deadline, and Richardson offers no extraordinary circumstances that prevented him from raising in the Petition Skyway's alleged failure to identify Groverland.³⁶

IV. CONCLUSION

11. With this Order, we deny the Motion, dismiss the Supplement, and reset the pleading cycle for the underlying Petition. Any substantive allegations raised in the Motion or Supplement are not part of the record.

V. ORDERING CLAUSES

12. Based on the foregoing, IT IS ORDERED, pursuant to Section 405(a) of the Communications Act of 1934, 47 U.S.C. § 405(a), and Section 1.106(f) of the Commission's rules, 47 CFR 1.106(f), that Richardson's Motion for Leave to File a Supplement to the Petition for Reconsideration is DENIED.

³⁰ 47 CFR 1.106(i) ("Petitions for reconsideration . . . shall be submitted to the Secretary. . . . Petitions submitted only by electronic mail and petitions submitted directly to staff without submission to the Secretary shall not be considered to have been properly filed").

³¹ See Reply at 2; *Gardner v. FCC*, 530 F2d 1086 (D.C. Cir. 1976).

³² See Reply at 4.

³³ Reply at 5-6, citing *Wireless Properties, LLC*, Memorandum Opinion and Order, 30 FCC Rcd 7077, 7713 (2015).

³⁴ March 20th Email ("there are 2 properties that are eligible for Registry Status, just 0.2 mi from the site, and one property about 1 mi away that is listed on the Registry").

³⁵ See Reply at 5, n.23 (citing Opposition, Exh. Q (Email from Ann Bevins to Amanda Kincaid, Craig Potts, William Richardson and others (Mar. 20, 2017))).

³⁶ We note that this analysis does not preclude the Commission from considering the Groverland property under Section XI of the NPA, only that we cannot do so in the context of the Petition. See NPA, § XI ("Any member of the public may notify the Commission of concerns it has regarding the application of this Nationwide Agreement within a State or with regard to the review of individual Undertakings covered or excluded under the terms of this Agreement. . . . The Commission will consider public comments and following consultation with the SHPO/THPO, potentially affected Indian tribes and NHOs, or Council, where appropriate, take appropriate actions. The Commission shall notify the objector of the outcome of its actions."); see also Letter from Charlene Dwin Vaughn, Assistant Director Office of Federal Agency Programs, Federal Permitting, Licensing, and Assistance Section, the Advisory Council on Historic Preservation, to Jeffrey Steinberg, Deputy Chief, Competition and Infrastructure Policy Division, FCC Wireless Telecommunications Bureau (May 11, 2017); Letter from Craig A. Potts, Executive Director and State Historic Preservation Officer, Kentucky, to Jeffrey Steinberg, Deputy Chief, Competition and Infrastructure Policy Division, FCC Wireless Telecommunications Bureau (Apr. 10, 2017).

13. IT IS FURTHER ORDERED that Richardson's Supplement to his Petition for Reconsideration is DISMISSED.

14. IT IS FURTHER ORDERED that the Pleading cycle for the Petition for Reconsideration is reset. Opposition and Reply to Opposition pleadings are due on October 25, 2017, and November 6, 2017, respectively.

FEDERAL COMMUNICATIONS COMMISSION

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